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IN THE

Supreme Court of the United States

OCTOBER TERM

St. Louis Southwestern Railway Company, *Petitioner*,

v. No. 364

Missouri Pacific Railroad Company, *Respondent*.

BRIEF FOR MISSOURI PACIFIC RAILROAD COMPANY

THE QUESTION WHETHER THE MISSOURI PACIFIC'S PROPOSED TRACK IS A SPUR TRACK OR AN EXTENSION WAS NOT IN ISSUE IN THIS PROCEEDING

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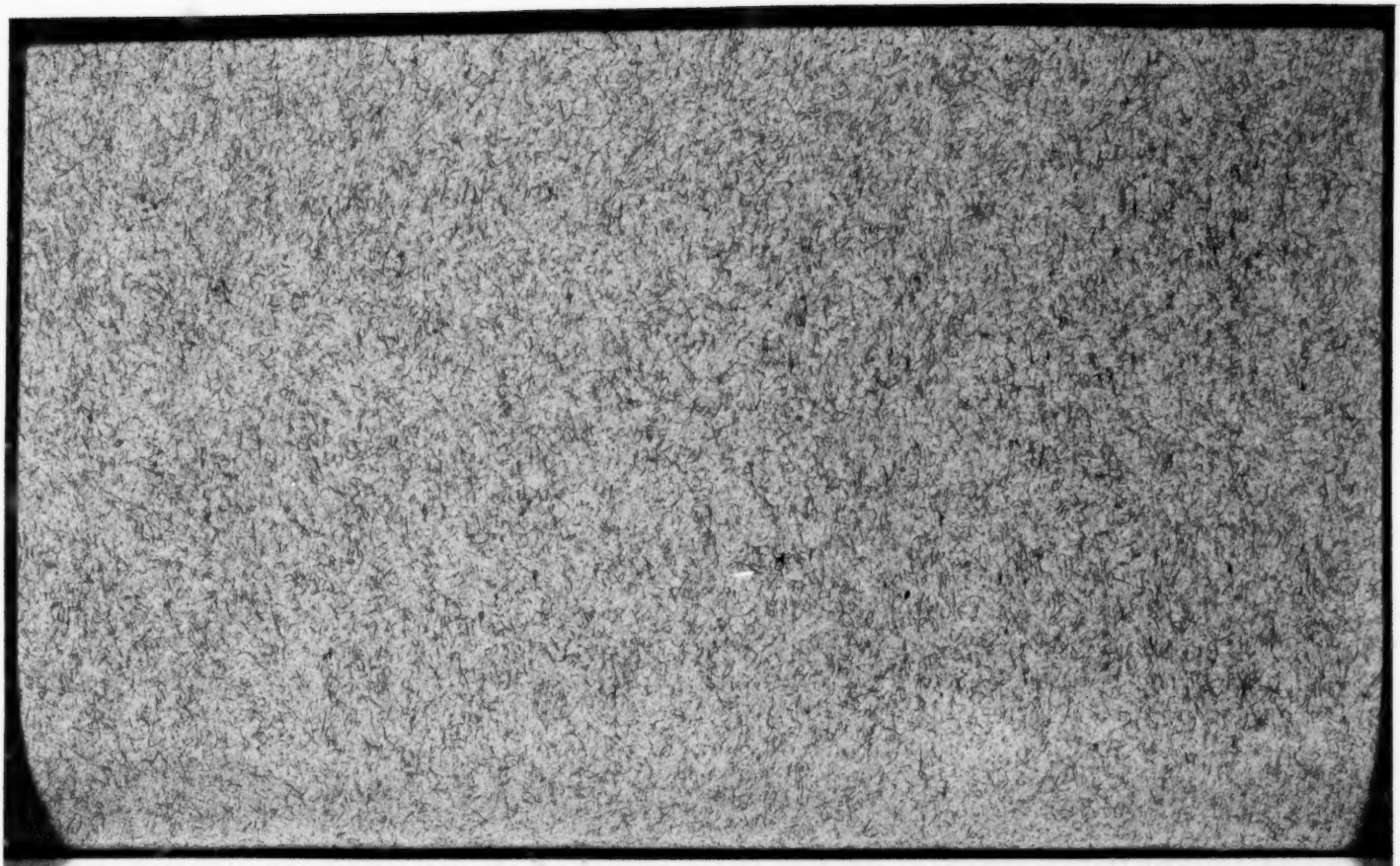

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ST. LOUIS, SOUTHWESTERN RAILWAY COMPANY ..... *Petitioner,*

v. No. 364

MISSOURI PACIFIC RAILROAD COMPANY ..... *Respondent.*

BRIEF FOR MISSOURI PACIFIC RAILROAD COMPANY

THE QUESTION WHETHER THE MISSOURI PACIFIC'S PROPOSED TRACK IS A SPUR TRACK OR AN EXTENSION WAS NOT IN ISSUE IN THIS PROCEEDING

Petitioner in its petition for certiorari says:

> "The question involved is whether the proposed track of the Missouri Pacific is a spur track or an extension."

We have never conceived that to be the question involved in this procedure.

In its "Summary of Argument" petitioner, assuming the track to be an extension, argues that "the

approval of the Interstate Commerce Commission was required before respondent was authorized to construct, maintain or operate the proposed track extension or to secure authority from the Arkansas Railroad Commission with respect to a crossing of such proposed track over petitioner's tracks."

But in passing on this respondent's petition it would be a matter of indifference to the Arkansas Railroad Commission whether the crossing prayed was for a track already existing or yet to be constructed. Respondent's petition merely invoked the Arkansas Commission's regulatory powers over crossing by one railroad of another. The question of the right to construct a track was not before the Arkansas Commission. The character of the track for which crossing was asked was not before that Commission. Without applying to the Arkansas Commission and without any kind of action by that commission this respondent might have constructed its tracks on both sides of the petitioner's railroad and then have asked that Commission just what it did ask in this case. When it is made clear that in exercising its jurisdiction in this case it was wholly a matter of indifference to the Commission whether the crossing was for a track already existing or yet to be constructed it becomes plain that the petitioner is mistaken in saying that "the question involved is whether the proposed track is a spur track or an extension."

If in passing on this respondent's petition the Arkansas Railroad Commission would have the same

duty regardless of whether the crossing was for a track already existing or one yet to be constructed then the character of the track is not material to that Commission's decision. That was the situation in our case. This respondent asked the Arkansas Commission to fix the point and manner of crossing for a track over a certain described track of the St. Louis, Southwestern Railway Company. The case was heard and the record made solely on the Missouri Pacific Railroad Company's application for a crossing, no other pleading being filed. The St. Louis, Southwestern Railway Company filed no response to that pleading before the Arkansas Commission. Its counsel at the hearing responded verbally: "The St. Louis, Southwestern Railway Company is opposing the application" (R. 8).

And suppose the court reverses this judgment and then this respondent applies to the Interstate Commerce Commission and obtains a certificate of convenience and necessity (it appears the evidence in this record would justify such a certificate) then this proceeding would have to be gone through with again. The Missouri Pacific Railroad Company would have to again apply to the Arkansas Railroad Commission to fix the point and manner of the crossing. It would seem proper and convenient for the court to hold that the question of whether this track was a spur or an extension was not in issue and leave that question to be settled by litigation in the court where the pro-

cedure is adapted to developing the evidence and more certainly ascertaining the rights of the parties. If the St. Louis, Southwestern Railway Company is correct that this is an extension which cannot be built until a certificate is granted by the Interstate Commerce Commission then the Missouri Pacific can never construct the track without that certificate (in the face of the opposition of the St. Louis, Southwestern) regardless of the Arkansas Railroad Commission's order fixing the point and manner of crossing. The latter is a preliminary to constructing the track and the right to construct a track must be obtained in the lawful way, whatever that may be, before it is constructed. But it is submitted that it would be in order and convenient that the benefit of the proceeding already had before the Arkansas Commission in performing a duty which devolves on it regardless of the character of the track should be preserved and the cost and trouble of repeating it saved.

The proceeding now at bar did not start in any court but originated before the Arkansas Railroad Commission. The Arkansas statute provides that any appeal from that commission's order must be heard upon the record made before the commission. That statute after providing for an appeal to the circuit court of Pulaski County and the lodging in said circuit court of a full and complete transcript of all proceedings had before said commission and of all evidence before it, provides as follows:

"The said circuit court shall thereupon review such order upon the record presented as aforesaid in the case and enter its finding and order thereon and cause to be certified forthwith to said commission such order." Section 8417 z3 of Castle's 1927 Supplement to Crawford & Moses' Digest of the Statutes of Arkansas.

Therefore, no issue can be brought into the case that was not before the Railroad Commission.

Before that Commission the case was heard and the record made solely on the Missouri Pacific Railroad Company's application for a crossing, no other pleading being filed.

That application of the Missouri Pacific Railroad Company (R. 2-3) was filed pursuant to Section 8417 q1 of 1927 Supplement to Crawford & Moses' Digest of the Statutes of Arkansas, which is also found as Section 1643 of Crawford & Moses' Digest of Statutes of Arkansas.

That application did not ask for authority to construct any track. It invoked the Railroad Commission's regulatory jurisdiction over railroad crossings. It asked the Commission to fix the point and the manner of crossing and the terms of installation, operation, maintenance and protection thereof.

Proceeding under that statute (Section 8417 q1 of 1927 Supplement of Crawford & Moses' Digest of the Statutes of Arkansas) the Missouri Pacific could not

have, even if it so wished, asked or obtained authority to construct this spur track. That statute reads as follows:

> "The commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expense, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable, and to alter or abolish any such crossing, and to require where, in its judgment, it would be practical a separation of grades of any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made, and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations, affected or between such corporations and the state, county, municipality or other public authority in interest. Act April 1, 1919, p. 411, sec. 9; Crawford & Moses' Digest, sec. 1643."

Material testimony in such proceeding is such only as bears on the safety and convenience of the particular point asked for the crossing, whether it should be at grade and the terms and conditions of installation, cost and operation.

The applicant would not go to that hearing prepared to present evidence as to whether the proposed track was a spur track as distinguished from an extension of its line of railroad. The applicant would not be expected to try that question.

And we find that the Missouri Pacific Railroad Company at that hearing did not undertake to develop the facts on its contention that it was not an extension of its line of railroad. What its witnesses said about the nature, purpose and surroundings of the track was merely incidental and bears only on the propriety of the particular point and manner of the crossing. The St. Louis Southwestern Railway Company's attorney appeared in opposition to the application and on cross-examination of the applicant's witnesses tried to develop facts on the question whether the proposed track was a spur track or an extension of the carrier's line of railroad. He also introduced some witnesses but their testimony was not aimed at that question, being confined substantially to the adequacy of the St. Louis Southwestern Railway Company's service. The facts developed at the hearing on the question of whether the track was a spur track or an extension of the carrier's line of railroad were fragmentory and incidental only.

In other words, that was not the question and could not be which the Arkansas Railroad Commission was being called upon to determine. And this is a case of the petitioner here trying to have this action determined on an issue not heard and determined by the trial tribunal and on testimony not directed to that issue. To do so would not further justice. Had that issue been before the trial tribunal this respondent could and would have adduced evidence supporting its contention that the proposed track is an industrial spur track and not

an extension of its line of railroad. It would penalize the respondent and would work unduly in favor of the petitioner to decide this question without this respondent having had an opportunity to present the evidence on that. Respondent could not have been expected to present its evidence on that contention when the question was not at issue.

THE RIGHT TO A CROSSING CAN NOT BE QUESTIONED IN THIS ACTION.

Petitioner can not in this action defeat or test this respondent's right to have a crossing over the petitioner's railroad. This is under the rule well settled in Arkansas that the only way to raise an issue on the right of a railroad to condemn property for its use, including a crossing of another railroad, is by a suit for injunction in a court of equity.

Neimeyer v. *Little Rock Junction Ry. Co.*, 43 Ark. 111.

Mountain Park Terminal Co. v. *Field*, 76 Ark. 239.

St. L., I. M. & S. Ry. Co. v. *Faisst*, 99 Ark. 61.

St. L., I. M. & S. Ry. Co. v. *F. S. & V. B. Ry. Co.*, 104 Ark. 344, 350.

In *Neimeyer* v. *Little Rock Junction Ry., supra.* the court said the proceeding by a railroad company under our statute to condemn a right-of-way is a special one and "no provision is made for any issue upon the RIGHT to condemn."

The other cases cited are to the same effect and further hold that the landowner is not without remedy against an illegal taking "and that the court of equity will mould adequate remedy by injunction in order to give relief to the landowner" (99 Ark., page 63).

The last-cited case, *St. L., I. M. & S. Ry. Co.* v. *F. S. & W. B. Co.*, applies the rule to an action by one railroad to condemn a crossing over another railroad (104 Ark. 350). The court said:

> "The doctrine established by our previous decisions is that a railroad corporation is, by its charter, clothed with the power of eminent domain to the extent of its necessities, and that this gives it a *prima facie* right to condemn, which can not be questioned in a statutory action at law brought in the exercise of its power of eminent domain. *Neimeyer* v. *Little Rock Junction Ry. Co.*, 43 Ark. 111, settles that question, we think, beyond dispute, and the only remedy is by injunction granted by a court of equity or by transfer to such court for equitable relief for the purpose of ascertaining the right of a corporation to exercise the right of eminent domain. That is the same as an independent suit in equity for an injunction. This applies to a suit by one railroad to condemn for the purpose of crossing the line of another railroad. The statute gives the court in those cases only the right to ascertain 'the point and manner of such crossing,' in addition to ascertaining the amount of compensation to be paid. The Constitution of this State (art. 17, sec. 1) declares that 'every railroad company shall have the right with its road to intersect, connect with, or cross any other road;' and whenever that right is asserted in an action at law to condemn, it cannot be questioned in that

forum. The only remedy is in a court of equity, to which the cause may be transferred on proper showing of facts sufficient to justify equitable relief, as indicated in the decision referred to" (104 Ark. 350, 351).

Thus the statutory proceeding to enforce a crossing (equally with any other right-of-way) is only to ascertain (1) the point of crossing (2) the manner of crossing and (3) the compensation for crossing and in such proceeding the right to have the crossing can not be denied.

The foregoing cases involved proceedings in the circuit court and under Section 8490, C. & M. Digest of Statutes of Arkansas, which provides that (1) the amount of compensation, (2) the point, and (3) manner of crossing shall be determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right-of-way; which is by a suit in the circuit court. But the principle and the rule must be the same in any other procedure substituted by statute.

In other words, if the Legislature has now substituted for the above-named suit in the circuit court a proceeding before the Railroad Commission to fix the point and manner of crossing, that substitution does not affect the application of the rule of the foregoing authorities. It still remains true that the right to the crossing cannot be denied except upon an issue made in a court of equity which would entitle to injunction.

This brings us to the question in what tribunal is the jurisdiction to enforce or condemn the crossing. As we have seen in the act of 1883 (Sec. 8490, C. & M. Digest), it says the same (that is the (1) compensation, the (2) point, and the (3) manner of crossing) shall be ascertained and determined by a court of competent jurisdiction, in the same manner as provided for the ascertainment of damages for right-of-way for railroads, which puts it in the circuit court.

But in 1919 the Legislature enacted a statute in part as follows (now Section 1643, C. & M. Digest), which is the statute under which Missouri Pacific Railroad Company brought the action now at bar:

> "Crossings. The Commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable and to alter or abolish any such crossing and to require where, in its judgment, it would be practical, a separation of grades of any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made, and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations, affected or between such corporations and the State, county, municipality or other public authority in interest."

But the jurisdiction thus given the Railroad Commission doesn't reach to denying a crossing. A rea-

sonable regulation of the exercise of the right of crossing is all that is intended by the statute. And if it intended to give jurisdiction to prohibit or deny a crossing it would be unconstitutional. Because the Arkansas Constitution guarantees the right of crossing by one railroad over another.

Arkansas Constitution of 1874, Sec. 1 of Art. XVII, provides: "Every railroad company shall have the right with its road to intersect, cross and connect with any other road."

The Arkansas Supreme Court has held that the term "railroad" as used in that provision "includes all side tracks necessary or convenient for the company's business," and that a private industry track was so included.

> *Conway Oil & Ice Co.* v. *Gibson Oil Co.*, 175 Ark. 905.

Enforcing that right, the Legislature has enacted that a railroad corporation shall have the following among other powers:

> "Fifth: To construct their road upon or across any stream of water, watercourse, road, highway, railroad or canal which the route of the road shall intersect." (C. & M. Dig., Sec. 8450.)

It is also provided by the statute that:

> "Right to cross and intersect. Every railroad corporation created and organized under the laws of this State, or created and organized under the laws of any other State or the United States, and operating in this State, shall have the power

to cross, intersect, join or unite its railroad with any other railroad now constructed or that may hereafter be constructed at any point on its route and upon the grounds and right-of-way of such other railroad company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its construction. And every railroad company whose railroad is or shall be crossed, joined or intersected by any new railroad shall unite with the owners and corporation of such new railroad in forming such crossing, intersection and connection, and shall grant to such railroads so crossing, intersecting or uniting all the necessary facilities for that purpose as aforesaid."

Section 8489, C. & M. Digest of the Statutes of Arkansas:

"Compensation. If the two corporations cannot agree upon the amount of compensation to be made for the purpose set forth in the foregoing section, or the points or manner of such crossing, junctions or intersections, the same shall be ascertained and determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right-of-way for railroads."

Section 8490, C. & M. Digest of the Statutes of Arkansas.

Of this constitutional right of crossing, the Arkansas Supreme Court has said:

"Every railroad corporation takes its right-of-way subject to the right of the public to have constructed other highways across it when necessary in the same manner as it is subject to future

taxation or to reasonable regulations of the mode of using its property," and

"It is true that the crossing imposes a new burden but it is one to which it is subjected by the nature of the case and the terms of its charter."

Cairo & Trumann Southern R. R. Co. v. *Ark. Short Line*, 172 Ark. 317, 322.

The Railroad Commission, substituted for the circuit court to determine the point and manner of crossing is subject to the same limitation as the circuit court with reference to having no power to determine any issue on the right to cross. If that right is to be questioned it must be in a suit for injunction in the chancery court as held uniformly by the foregoing authorities with reference to the circuit court.

So respondent, having the right to cross petitioner's railroad with this spur track (at least until the contrary is shown to the satisfaction of a court of equity), applied to the Arkansas Railroad Commission pursuant to Section 1643 of C. & M. Digest to fix the point and manner of its crossing. We call the court's attention that the respondent's petition to the Railroad Commission did not ask for authority to construct the track but merely that it have a crossing at the particular "point named and at grade and at petitioner's expense of construction and in accordance with the terms of installation, operation, maintenance and protection of such crossing as may be fixed by your honorable body" (R. 3). The respondent's petition to the Railroad Commission does not submit any issue as to

respondent's right to construct the spur track nor as to its right to have a crossing over petitioner's railroad track. In line with the foregoing constitutional and statutory provisions and the decisions of the Arkansas courts, respondent did not conceive that the Railroad Commission had jurisdiction to pass on its right to build this spur track, nor to pass on its right to have a crossing over petitioner's railroad track other than to fix the point and manner thereof. The petition to the Commission therefore was confined to describing the location and character of the spur track which it intended to build and the track which it desired to cross and to stating the point and manner it desired and then prayed that it have said crossing at such point named and at grade and at applicant's expense and in accordance with the terms of installation, maintenance, operation and protection to be fixed by the Commission (R. 3).

Of course the petitioner is not without remedy, but it must pursue that remedy by the procedure fixed by our statutes and decisions, which is by suit for injunction in a court of equity. And it has pursued that remedy and has now pending in the United States District Court for the Western Division of the Eastern District of Arkansas its suit in equity against respondent to enjoin it from constructing said spur track on the grounds argued by petitioner in its brief in this case. In that suit will be settled the issues which it submits here as a reason why respondent's right to cross petitioner's railroad track should be wholly denied.

The tribunal where this suit was begun is wholly without jurisdiction of that question, which is sufficient reason why that question is not before this court and cannot be in this action determined.

Additional reason why that question is not in this case is because it involves the absolute denial of appellee's right to cross. It presents an issue of the right of crossing which, under the settled rule of the foregoing authorities, can only be made in a court of equity. And every case relied on by the petitioner on this question is a suit in equity for injunction. Petitioner has its remedy in the courts of equity and may pursue it whenever it thinks wise, and, as already stated, is now pursuing it but cannot inject that issue in this case. But under the Arkansas Constitution, statutes and authorities foregoing cited the Railroad Commission was without power to deny the respondent's right to cross. Its jurisdiction reached only to fixing the point and manner of crossing.

PETITIONER MADE A JUDICIAL ADMISSION IN OPEN HEARING WHICH, REGARDLESS OF OTHER CONSIDERATIONS, JUSTIFIES THE JUDGMENT APPEALED FROM

At the trial before the Arkansas Railroad Commission, near the close of the testimony, counsel appearing for petitioner made the following formal statement:

> "By Mr. Kiskaddon: Mr. Rockenback testified the Argenta proposition is out, and that con-

tract does not concern us. The proposition now open is we will give rights over 400 ft. into the Dixie Mill if they will give us right over some tracks into the Norton-Wheeler Stave Company at Pine Bluff. That is all that is open. That proposition is open right now."

The testimony was then closed and the Arkansas Commission took the matter under advisement. While it was under advisement this respondent formally accepted the aforesaid proposition made by petitioner's counsel by communicating its acceptance to petitioner's proper officials and thereafter by filing before the Arkansas Commission its petition for rehearing setting out the offer and this respondent's acceptance of it and praying that the Commission enforce it by order made in the case (R. 78-80).

To understand the bearing of that proposition, it is necessary to go into the facts in some detail.

The Dixie Cotton Oil Company operated a cotton oil mill in North Little Rock. It was served from the St. Louis-Southwestern Railway Company and the Chicago, Rock Island & Pacific Railway Company by tracks into its plant, but sixty per cent of its total business moved over the railroad of this respondent (R. 33), being switched from the Dixie plant by the St. Louis-Southwestern to an interchange track, where this respondent picked it up. This respondent had a contract with the St. Louis-Southwestern for joint use of the latter's lead track to within 400 feet of the Dixie plant. To enable it to carry this traffic directly

to and from the Dixie plant, the respondent needed only the right to operate 400 feet from there over the St. Louis-Southwestern track. There was no physical obstacle or inconvenience, and only petitioner's consent was needed to accomplish such a handling. It is in evidence that for four years the Dixie plant had sought direct connection with the Missouri Pacific (R. 34).

In February, 1930, the Dixie people renewed their effort with carriers to accomplish direct connection with the Missouri Pacific tracks. Mr. Rice, the principal owner of the Dixie plant, originated the negotiations and on February 27, 1930, wrote to President Gorman, of the Rock Island, and President Upthegrove, of the St. Louis-Southwestern, stating:

> "The movement of cottonseed into our Dixie plant at Little Rock off the Missouri Pacific has increased to such an extent that we think it is necessary to make arrangements for that company to have the use of the track serving our plant, in order to expedite the switching service. Our trackage contract with your company runs out on August, 1930, and this is to notify you of our desire for a conference to arrange for new trackage arrangements on use of tracks by the Missouri Pacific."

Mr. H. R. Wilson's testimony as to the further course of these negotiations is undisputed and is as follows:

That letter resulted in a conference on April 30, 1930, in Memphis between Mr. Rice of the Dixie Mill, Mr. Rockenback of the St. Louis-Southwestern, Mr.

Stewart, Industrial Commissioner of the Rock Island, Mr. Brooks and Mr. Wilson of the Missouri Pacific, at which Mr. Rice stated that the Dixie wanted the Missouri Pacific service and his reasons. Whereupon, Mr. Stewart, of the Rock Island, agreed for the Missouri Pacific to serve the plant by having joint use of such tracks as belonged to the Rock Island into the plant. Mr. Rockenback, of the St. Louis-Southwestern (commonly called the Cotton Belt), stated there were features he could not pass on and which he would have to submit to his management, and also he advised us that they were not in position to allow us access to the plant except under certain terms and conditions, which we felt were so unreasonable that we could not meet them. So we were unable to agree with the Cotton Belt (R. 35).

"There is a contract existing between the Rock Island, Cotton Belt and Dixie Cotton Oil Mill involving tracks owned by each of the three parties inside the Dixie plant enclosure. That contract is a continuing one, but may be canceled upon thirty days' notice. When we were not able to make satisfactory arrangements with the Cotton Belt for serving the plant, Mr. Rice served notice on the Cotton Belt of his intention to cancel contract on its anniversary, August 30, 1930, and said to us that would settle the matter so far as the Missouri Pacific's access to the plant's tracks were concerned. He told the Cotton Belt he would be very glad to see them continue in the plant, but as they had

not been able to get together that he felt the Missouri Pacific was more necessary to him than the Cotton Belt—that if he had to choose between one or the other he would have to take the Missouri Pacific'' (R. 36).

The Missouri Pacific then further negotiated with the Cotton Belt with the view to serving the plant by joint use of the present Cotton Belt switch. The former old main track of the Cotton Belt is now used by it as an industrial lead. From it a Cotton Belt switch runs to the Dixie plant. There is already in force a contract between the Cotton Belt and the Missouri Pacific for the use by the Missouri Pacific of that Cotton Belt industrial lead and connections to a point only about 400 feet from the Dixie plant. The extension by agreement of this contract, joint use for 400 feet further would enable the Missouri Pacific to serve the Dixie plant directly without building additional trackage (R. 34). It was the effort of the Missouri Pacific in the negotiations to obtain this extension.

At that time the negotiations came to naught solely because the St. Louis-Southwestern attached as conditions to its granting direct joint use of the 400 feet of its track into the Dixie plant concessions from this respondent which the latter found so unreasonable and burdensome as to be impossible of acceptance.

It is necessary to explain what those concessions were in order to show the bearing of the proposition of petitioner's counsel above referred to. From the

testimony, beginning at page 65 of the record, the following facts appear:

About 1924 the Missouri Pacific bought the Argenta Terminal Railway, which was an industrial line about three quarters of a mile long, built in 1916 by the Twin City Development Company, connected with the Rock Island tracks and crossing the Cotton Belt's old main and from which spurs lead to various industries. At the time of this purchase by the Missouri Pacific, the Argenta Terminal had a long outstanding contract (unknown to the Missouri Pacific) with the Cotton Belt which prohibited the Argenta Terminal from extending any new spurs off this track without the Cotton Belt's consent. When the Missouri Pacific was informed of that contract it declined to be bound by it, claiming that it did not know of it and did not assume it, and, as vendee of the Argenta Terminal, was not legally bound by it. Of course, that restriction was a great burden and tremendously restricted the use and benefits which the Missouri Pacific thought it was getting when it purchased the Argenta Terminal. It was advised that it was not bound by the contract, not having known of or assumed it. Naturally, it was unwilling to waive or surrender its contention. The Cotton Belt claimed the Missouri Pacific was bound by the contract. It was a question which could readily and with little expense be submitted to the courts. And, of course, the Missouri Pacific recognized that it probably would have to meet the Cotton Belt in litigation on it sooner or later. But such a vital right depended

on its contention that it could not afford to surrender or waive it without taking the court's judgment on it (the question has since then been decided in favor of Missouri Pacific's contention by the Pulaski Chancery Court, Little Rock, Arkansas).

In proposing the terms on which it would let the Missouri Pacific use the 400 feet additional Cotton Belt track into the Dixie plant, the Cotton Belt, after naming that the Missouri Pacific should extend to the Cotton Belt the use of about 1,000 feet or more of the Missouri Pacific track into certain industries at Pine Bluff, further demanded that the Missouri Pacific surrender and waive its contention that it was not bound by the Argenta Terminal contract aforesaid and that it acknowledge that it was bound (the court will understand that this Argenta Terminal track and spurs do not touch the Dixie plant or have any bearing on the Missouri Pacific reaching to that plant, but is a collateral matter).

The Missouri Pacific, although it considered that the access over its tracks at Pine Bluff named by the Cotton Belt was a greater concession than its use of the 400 feet of the Cotton Belt's track into the Dixie plant, yet was willing to grant that concession. And, except for the Cotton Belt's impossible demand that the Missouri Pacific acknowledge itself bound by the old Argenta Terminal agreement, the two roads could probably have gotten together on an agreement for the use of the Cotton Belt's 400-feet switch into the Dixie plant.

MR. H. R. WILSON further testified:

"When we purchased the Argenta Terminal Railroad, we purchased the physical properties of the railroad. A contract was presented to us as existing between the Argenta Terminal Railroad and the Cotton Belt, under which the Cotton Belt was given the right to use the road, I think, until sometime in May, 1931. That was the contract that was represented to us by the owners of the Argenta Terminal Railroad as being the contract in existence. We had a deed to the property, subject to that contract, and the contract was recorded with the deed. The first knowledge we ever had that there was any claim there was a previous contract in existence was this letter from Mr. Rockenback. If we had agreed to that, it would have meant we would have to give up 50% use of a railroad we paid a great deal of money for and on which we have no rights beyond 1931" (R. 65).

We objected to accepting his proposition "because it attempted to settle this dispute. In other words, as we understood his proposition, it demanded whatever legal right we may have to contest that contract would have to be waived aside as a part of this trade" (R. 66).

At the conclusion of Mr. Wilson's testimony showing the foregoing facts, Mr. Kiskaddon, petitioner's counsel, in open hearing, made the judicial admission or proposition first herein set out.

By it the objectionable condition standing in the way of respondent's and petitioner's agreement for the use of the 400 feet of track into the Dixie plant was withdrawn. Thereupon, as already stated, the authorized general manager of the respondent advised the authorized officer of the petitioner that Mr. Kiskaddon's proposition in open hearing was acceptable.

Petitioner has contended that the statement of its counsel, Mr. Kiskaddon, has no bearing because it was an offer to compromise. That is not the right view. It was a judicial admission formally made, and when it was shown that this respondent had formally accepted the offer and prayed the Commission to enforce it, it was error for the Commission to refuse to hear testimony and to deny the petition for rehearing. The Commission is a regulatory body and can mould its remedies. It should have enforced consummation of the petitioner's formal judicial offer or should have granted respondent's petition. And for this reason, regardless of other considerations, the circuit court of Pulaski County, on appeal, and the Supreme Court of Arkansas were right in adjudging that respondent's petition should be granted.

THE PROPOSED TRACK IS NOT AN EXTENSION OF RESPONDENT'S LINE OF RAILROAD BUT IS A SPUR OR INDUSTRIAL TRACK

While the evidence on the point in the record is meager, for the reasons already stated that this point

was not in issue, we submit it still is sufficient to show that the proposed track is not an extension of petitioner's line of railroad within the meaning of paragraph 18 of Section 1 of the Interstate Commerce Act, but is a spur, industrial switching or sidetrack located wholly within one State within the meaning of the exception in paragraph 22 of Section 1 of that act.

Had this question been in issue, it could and would have been shown that movements over the proposed track would be solely switching movements. No road trains would be run over the track; all movements would be under yard rules; no operations on them under train orders from the dispatcher's office; no additional freight charge for transporting the freight over the track; and no change in rates or other tariff charges different from those for transporting freight destined to or from the city of North Little Rock. That in respondent's reports made according to law to the Interstate Commerce Commission, on which all regulatory action of that Commission toward respondent as a common carrier is based, this track would be classified as a sidetrack or industrial track and not as main line or branch.

It is shown that the track is physically a spur track, being connected with respondent's railroad only at one end; that its purpose is to serve an industry.

Petitioner seeks to bring this within the facts which controlled the decision in *T. & P. Ry. Co.* v. *Gulf*

C. & S. F. Ry. Co., 270 U. S. 266, 70 L. Ed. 578. This court in that case said:

> "The carrier was authorized by Congress to construct without authority from the Commission 'spur, industrial, team, switching or side tracks * * * to be located wholly within one state.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply facilities to others who being within the same territory and similarly situated are entitled to like service from the carrier."

The court's language here, "to improve the facilities required by shippers already served" or "to supply facilities to those within the same territory and entitled to like service," states the distinguishing feature of these spur, etc., tracks.

We find the track answers the description of a spur track given in the first case where the question came before the courts, *Detroit & M. Ry. Co.* v. *Boyne City G. & A. Ry. Co.*, 286 Fed. 546. There the court said:

> "The distinguishing feature between 'extensions' and 'new lines' on the one hand and 'spur, industrial, team, switching or side tracks,' on the other as used in this act is this, that the former are tracks over which there are to be train movements in the sense that such movements are a part of the transportation haul from shipper to consignee, while the latter named tracks are for use in loading and unloading, storing and switching."

The map in the record will show that the Dixie plant was accessible to this respondent's main line

(which is located about one mile northwest of said plant) as well as to the tracks of the petitioner. Respondent, by building a spur track from this said main line across intervening vacant lands, could reach the Dixie plant. Also reference to that map will show that the intervening territory is no more tributary to the petitioner's tracks than to respondent's. It simply lies between the petitioner's and the respondent's tracks and equally open to both for development as industrial plants. There is therefore no invasion by respondent of petitioner's territory such as was found to be the fact (on very elaborate testimony which is altogether absent in this case because the question was not in issue) in *T. & P.* v. *Gulf C. & S. F., supra.*

The track was "to supply facilities to those within the same territory and entitled to like service" from respondent as plants already being served by respondent.

Nor does the building of the proposed track north of and parallel to petitioner cut the latter off from access to the territory. The spur track of petitioner which this respondent has asked to cross would still extend on the north and east side of this respondent's proposed track and give complete access equal with respondent to all vacant industrial territory north and east of respondent's proposed track. And, of course,

petitioner's lead track west of respondent's proposed track would give access equally with respondent to all of the vacant territory lying west of respondent's proposed track.

Dated Little Rock, Ark., Jan. 11, 1933.

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